313 U.S. 589

FILED
APR 26
CHARLES ELMORE

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1940

No. 994

WONG YIM alias George Wong,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.

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PARKER-WALAH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Petitioner, Wong Yim alias George Wong, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review the final judgment of said court entered in the above entitled cause on March 22, 1941, affirming the final judgment of the District Court of the United States for the Territory of Hawaii.

OPINIONS BELOW.

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals is unreported. It appears in the record following page 267.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioner was indicted with two others for unlawfully trafficking in narcotics in violation of 21 U.S.C.A., section 174. (R. 5-11.) The indictment was filed in the District Court on December 22, 1938. (R. 11.)

On January 6, 1939, petitioner filed an application for *dedimus potestatem* to take the testimony of two witnesses residing in Hong Kong, China. (R. 12-19.) His application recited that their testimony was necessary to prevent a failure of justice (R. 14) in that by their testimony an explanation would be given as to why certain moneys were sent to China by petitioner. (R. 15-17.) The motion was presented on January 10, 1939, and denied. (R. 28.)

On January 10, 1939, petitioner filed a motion to quash venire on the ground that the panel selected as prospective jurors was not "representative of the citizenry" of the Island of Oahu (the place of trial) or of the Territory of Hawaii. (R. 19-23.) The motion was presented on January 10, 1939, and denied. (R. 28.)

Trial was had on January 11, 1939 (R. 28), and petitioner was found guilty by the jury and judgment was thereafter entered. (R. 37-38.) This judgment was affirmed by the Circuit Court of Appeals for the Ninth Circuit on March 22, 1941.

JURISDICTION.

The jurisdiction of this court is invoked under section 240 (a) of the Judicial Code. (43 Stat. 938; 28 U.S.C.A., sec. 347.)

QUESTIONS PRESENTED.

(1) Did the trial court abuse its discretion in denying the application for *dedimus potestatem?*

(2) Did the trial court abuse its discretion in denying the motion to quash venire?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(1) THE CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The application for *dedimus potestatem* was made under 29 U.S.C.A., sec. 644. It reads:

> "In any case where it is necessary, in order to prevent a failure or delay of justice, any of the courts of the United States may grant a dedimus potestatem to take depositions according to common usage; . . ."

With reference to this statute, the opinion recites that "Although the statute under which the application was made is an old one, few questions under it have arisen". The opinion also recites that "If the testimony of the two witnesses would be conclusive then it might be argued that a failure of justice would be prevented. However, such is not the case, for the jury (the exclusive judge of the credibility of witnesses) might choose to disbelieve such witnesses. In

such an event, the dedimus potestatem of either witness or both, would not 'prevent a failure or delay of justice'."

It is therefore the decision of the Circuit Court of Appeals that trial courts may arbitrarily deny applications under the section as juries may disbelieve the testimony of witnesses thus taken. The importance of this question requires the settlement thereof by this court.

The Circuit Court of Appeals for the Ninth Circuit has not heretofore been committed to the view above stated. It ordered a reversal in *Young Bark Yau v. United States,* 33 F. 2d 236, solely on the ground that an application for *dedimus potestatem* has been denied by the trial court. It expressed the view that availability of evidence furnished the test by which the discretion of the trial court was to be measured. The case there was clearly one in which the triers of fact could have disbelieved the testimony of the prospective witnesses. The test of availability of evidence rather than credibility of witnesses is also found in the earlier decision of said court in *Tom Ung Chai v. Burnett,* 25 F. 2d 574, 575-6.

The decision in the said Ninth Circuit are plainly not in harmony on the subject, and the importance of the question merits the intervention of this court.

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(2) THE CIRCUIT COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY CONFLICTING WITH THE APPLICABLE DECISION OF THIS COURT.

The mixed character of the "citizenry" of the Territory of Hawaii is a matter of common knowledge.

The motion to quash the venire established that of the 35 persons selected as prospective jurors 32 were of American or Caucasian ancestry (excluding the Portuguese). (R. 20.) A tabulation of the racial percentages prevalent at the venue of the action appears in the record. (R. 21.) It is evident therefrom that over 75% of the citizenry reflects races other than Americans or Caucasians. But the venire in the present case reflected a percentage of 91% Americans or Caucasians. There is manifestly in the Territory of Hawaii a violation of the principles announced by this court in *Norris v. State of Alabama,* 294 U.S. 587. The present decision is plainly in conflict with that decision in the matter discussed.

CONCLUSION.

Wherefore petitioner respectfully prays that a writ of certiorari be issued to the United States Circuit Court of Appeals for the Ninth Circuit and that the final decree of said court in said cause be reviewed and reversed.

Dated, San Francisco, California,
April 23, 1941.

JAMES M. HANLEY,
Counsel for Petitioner.

E. J. BOTTS,
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Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 994

WONG YIM ALIAS GEORGE WONG, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 270–273) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 22, 1941 (R. 273–274). The petition for a writ of certiorari was filed April 26, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the trial court committed reversible error in denying petitioner's application for a dedimus potestatem to take the depositions of certain persons in China.

2. Whether petitioner's motion to quash the venire of petit jurors because it was not "representative of the citizenry" of the First Judicial Circuit, Territory of Hawaii,[1] was properly denied.

STATUTES INVOLVED

R. S., Section 866 (U. S. C., Title 28, Sec. 644) provides as follows:

> In any case where it is necessary, in order to prevent a failure or delay of justice, any of the courts of the United States may grant a dedimus potestatem to take depositions according to common usage; * * *

Section 3719, Revised Laws of Hawaii, 1935, provides so far as pertinent:

> SEC. 3719. DUTY TO MAKE LIST, ETC. The jury commission of each circuit shall in each year make and file with the clerk of the circuit court at least ten days before the next term of court two certified, separate lists of citizens to serve respectively as

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[1] The First Judicial Circuit of the Territory of Hawaii is composed principally of the Island of Oahu. Section 3630, Revised Laws of Hawaii, 1935.

grand and trial jurors in the circuit court for the ensuing year. It shall select and list the names of one hundred citizens as trial jurors and fifty citizens as grand jurors, except that in the first circuit six hundred and fifty trial jurors and seventy-five grand jurors and in the fourth circuit one hundred fifty trial jurors and fifty grand jurors shall be selected and listed. If in any of the circuits the jury commission shall not be able to select the number required by this section for jurors, it shall select the highest number practicable.

All of such selections shall be citizens whom the respective commissions believe, after careful investigation in each case, to be qualified and not exempt under the provisions of this chapter. If practicable, no person shall be selected who has served as a juror or grand juror within one year. All of such selections shall be made without reference to the political affiliations or to the race or place of nativity of citizens, with a view to obtain lists representative of the qualified citizenry of each circuit.

* * * * *

STATEMENT

On December 22, 1938, an indictment in four counts was returned against petitioner and two others [2] in the District Court of the United States

[2] Co-defendant Sin Muk pleaded guilty prior to trial (R. 24–25) and testified for the Government (R. 73–102). Co-defendant Chin Chun Hee pleaded nolo contendere at the close of the Government's case (R. 33).

for the Territory of Hawaii (R. 5–11). Count 1 of the indictment charged a conspiracy to violate Section 174, Title 21, U. S. C. (relating to the importation, concealment, etc., of smoking opium) and Subchapter A of Chapter 12, Title 26, U. S. C. (relating to the purchase, sale, etc., of non-tax-paid opium). Counts 2 and 3 charged violations of Section 174. Count 4 charged a violation of Subchapter A of Chapter 12.

On January 6, 1939, petitioner filed an application in the District Court alleging that "in order to prevent a failure of justice" it was necessary that the court grant a dedimus potestatem to take the depositions of Kwock Jung Fong and Loo Shee, petitioner's sister-in-law, in China (R. 12–19). The application alleged that Kwock Jung Fong would testify that in September 1938 petitioner had sent him 600 American dollars by cable to be delivered to Loo Shee and that he had delivered the money to her; that Loo Shee would testify that prior to September 1938 she had written petitioner for money to enable her to go to the United States and escape the consequences of the war in China, and that petitioner sent to her through Kwock Jung Fong approximately $600 for that purpose; that because of restrictions in the immigration laws of the United States, Loo Shee was unable to come to the United States and that upon learning of that

fact, she sent petitioner a cablegram bearing the message "Not Come," meaning thereby that she was not coming to the United States.

The application then alleged that the above testimony was absolutely essential because at a hearing in that court on a motion to revoke the probation of petitioner's codefendant Ching Chun Hee, it had developed that the latter had in his possession a telegram, addressed to petitioner, containing the words "Not Come," that the petitioner "fears that said telegram will be used against him" at his trial as indicating that he had participated in the transmission of money to China for the purchase of narcotics, and that Kwock Jung Fong and Loo Shee were the only persons, besides petitioner, who could explain the cablegram (R. 12–19).

On January 10, 1939, a hearing was had on the application and, after argument on both sides, the application was denied (R. 50–55).

Also, on January 10, petitioner filed a "Motion to Quash Venire" (R. 19–23). So far as now pertinent this motion stated that of the thirty-five persons drawn as prospective jurors to try petitioner, one was of Chinese ancestry, two of Caucasian-Hawaiian ancestry and the remaining thirty-two of American or other Caucasian ancestry, no Japanese, Portuguese, or pure Hawaiians having been drawn; that the various races composing the citizenry of the Island of Oahu were

represented in approximately the following percentages:

American	Between	21% and 22%
Hawaiian	"	18% and 19%
Japanese	"	18% and 19%
Portuguese	"	13% and 14%
Chinese	"	11% and 12%
Part Hawaiian	"	8% and 9%
Others	"	5% and 6%

and that consequently the jury panel was not impartially chosen without regard to race or color and hence was not "representative of the citizenry" of the Island of Oahu, as required by the Hawaiian laws.

At this hearing on the motion (R. 56–64) it was stipulated that the percentage of races on the Island of Oahu as set forth in the motion (R. 21) was acceptable (R. 58); that the Clerk of the District Court and the jury commissioner, in making up the jury list, selected the names at random from the list of registered voters in the Territory of Hawaii without reference to race, and that there were names of members of all the races in the jury box (R. 58–59). Petitioner conceded that the jury list was probably representative of the citizenry of the Territory (R. 60), and stated that there was no objection to the manner in which the venire was drawn (R. 61), but contended that the jury as drawn was not representative of the citizenry (R. 62).

The motion to quash the venire was denied, the District Court stating that if a fair representation

of every nationality or class of citizens had to be included in a venire, the "secret of the jury drawing would be destroyed" since "the Clerk would have to make out the name and find out the nationality or class to which they belonged, and that may not be done" (R. 62–63).[3]

Petitioner was found guilty on the first three counts (a verdict of not guilty having been directed on Count 4) (R. 35, 39, 244). He was sentenced to a total of ten years' imprisonment and a fine of $500, and in addition, placed on probation for five years (R. 37–38).

Upon appeal to the Circuit Court of Appeals for the Ninth Circuit, the judgment of conviction was unanimously affirmed (R. 270–274).

ARGUMENT

I

While the petition (p. 3) presents the question whether the trial court abused its discretion in denying petitioner's application for a dedimus

[3] The method of drawing the jury was thus described by the court (R. 62–63): "The drawing of the names out of the jury box is a secret process; the names are selected by the jury commissioner, placed in the jury box; these are all shaken up together and then the names are drawn out by the Clerk one at a time; the Clerk does not know the class or form of citizenry of the juror or the nationality; and when the required number are drawn, secretly by the Clerk in the presence of the Court, and in open court, the required names selected compose the jury irrespective of the percentage of the class or form of nationality they may possess."

potestatem under R. S., Section 866 (*supra*, p. 2), the reason assigned for the allowance of the writ seems to be that the Circuit Court of Appeals sustained the action of the trial court upon a ground alleged to be inconsistent with its earlier decisions in *Tom Ung Chai* v. *Burnett*, 25 F .(2d) 574, and *Young Bark Yau* v. *United States*, 33 F. (2d) 236 (Pet. 3–4).

It is unnecessary to consider the correctness of the specific ground upon which the Circuit Court of Appeals upheld the trial court's action since it is clear, we submit, that no reversible error can be predicated upon the trial court's denial of the petitioner's application for a dedimus potestatem.

(1) R. S., Section 866[4] (*supra*, p. 2), provides that the courts of the United States *may* grant a dedimus potestatem to take depositions only "where it is necessary, in order to prevent a failure or delay in justice." It has uniformly been held that the burden is upon the person seeking the dedimus potestatem to establish the necessity for the deposition and that the trial court's ruling

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[4] This section has been held applicable in criminal cases, although the question has been raised only in a few instances. *United States* v. *Hofmann*, 24 F. Supp. 847, 849 (S. D. N. Y.); *United States* v. *Cameron*, 15 Fed. 794 (E. D. Mo.); *Clymer* v. *United States*, 38 F. (2d) 581 (C. C. A. 10th). We deem it unnecessary in the instant case to question these holdings.

will not be disturbed unless there has been an abuse of discretion.[5]

We think it clear that in the present case the petitioner failed to sustain the required burden and that the trial court did not abuse its discretion in denying petitioner's application.

(a) It is obvious that the only value which could have accrued to petitioner from the proposed Chinese depositions would be an attempted explanation of his reason for sending money to China. However this attempted explanation bears on its face the indicia of improbability. The application stated that petitioner's sister-in-law was prohibited from coming to the United States because of restrictions in our immigration laws. It is difficult to believe that petitioner would have sent some $600 to China to enable his sister-in-law to come to this country when he could have readily ascertained that she was ineligible for admission under our laws. And there was nothing before the District Judge to show that petitioner was unaware of her ineligibility. Under these circumstances we think that the District Court was fully

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[5] *Tom Ung Chai* v. *Burnett*, 25 F. (2d) 574, 575–576 (C. C. A. 9th), certiorari denied, 278 U. S. 614; *Clymer* v. *United States*, 38 F. (2d) 581, 582 (C. C. A. 10th); *United States* v. *Hofmann*, *supra*, at p. 849; *Westinghouse Mach. Co.* v. *Electric Storage Battery Co.*, 165 Fed. 992, 995 (D. N. J.); *Magone* v. *Colorado Smelting & Mining Co.*, 135 Fed. 846, 848 (D. Mont.); *Randall* v. *Venable*, 17 Fed. 162, 163 (W. D. Tex.); *United States* v. *Cameron*, *supra*, at p. 797.

justified in assuming that petitioner knew that his sister-in-law could not come to the United States and that consequently there was no justification for delaying the criminal trial in order to obtain the depositions (R. 53–55; see also R. 258–259).

(b) In any event the record clearly discloses that petitioner was not prejudiced by the denial of his application for a dedimus potestatem.

At the trial two letters were admitted in evidence in behalf of petitioner, one from Jun Fong (Kwock Jung Fong) and one from Loo Shee (R. 217–221), the persons whose depositions petitioner desired to take. These letters corroborated in full detail petitioner's explanation of the circumstances surrounding the cablegram containing the words "Not Come" and thus afforded petitioner the full benefit of the testimony he sought to obtain by the dedimus potestatem.[6]

Moreover it is also apparent from the record that the cablegram was at most a minor factor in the Government's case. That the petitioner played an active and important part in the smuggling of the narcotics in question was established by the positive testimony of Sin Muk, a co-defendant who testified for the Government (R. 73–102; see e. g. R. 74–76, 79–80, 86–89, 91, 97, 101), and the corroborating testimony of Gon Sam Mue, a federal narcotic agent (see R. 117, 119, 126–130).

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[6] The $2,000 Hong Kong money referred to in these letters is equivalent to $600 American money (R. 190, 200, 214).

II

As is apparent from the Statement (*supra,* p. 6), the petitioner concedes that the jury list was unobjectionable and that the proper procedure was followed in drawing the venire. He nevertheless contends that he was tried by an improper jury because there was not a normal percentage of the several different races residing on the Island of Oahu represented on the jury panel. Petitioner's contention is clearly without merit.

Even if it be assumed that the Hawaiian statute (*supra,* pp. 2–3), upon which petitioner's contention apparently is predicated, were applicable to the federal District Court in Hawaii, it is obvious that that statute relates only to the preparation of jury lists and has no application to the drawing of a venire of trial jurors from such a list. Moreover, the very language of the statute shows that the selections for a jury list are to be made without reference to the race or place of nativity of those selected.

Also, as the District Court clearly pointed out (*supra,* p. 7) any requirement that the jury panel shall contain a fair representation of every nationality or race would destroy the secrecy of jury drawing.

Finally, as this Court has often stated, an accused has the right to a jury from which none of his race has been excluded, but he has no right to

have members of his race or any other race on the jury. *Virginia* v. *Rives,* 100 U. S. 313, 323; *Thomas* v. *Texas,* 212 U. S. 278, 282, 283; *Ruthenberg* v. *United States,* 245 U. S. 480, 481–482; *Martin* v. *Texas,* 200 U. S. 316, 321.

Norris v. *Alabama,* 294 U. S. 587, cited by the petitioner, is too clearly inapplicable to the facts in the instant case to require discussion.

CONCLUSION

The case presents no important question of federal law and there is involved no conflict of decisions. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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MAY 1941.

U. S. GOVERNMENT PRINTING OFFICE: 1941